

87-1788

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

MASON H. ROSE, V,

Petitioner,

v.

SUSAN T. FULTZ,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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April 26, 1988



QUESTIONS PRESENTED

1. In a diversity action, where the judgment debtor has appealed from an order for the execution sale of his property to the judgment creditor, does the judgment creditor's resale of the property to a non-party third person automatically moot the appeal, or does mootness depend on whether effective relief against the third person and/or the judgment creditor is still possible under the law of the forum state (here California)?

2. In enforcing a money judgment in a diversity action, may a federal district court refuse to follow the homestead and execution laws of the forum state (here California), and order a private execution sale of a family dwelling to the judgment creditor, so she can accept an offer for the resale of the dwelling to a third person?

3. If a judgment debtor cannot afford a supersedeas bond that would entitle him to a full stay on appeal, is he nevertheless entitled to a stay of the execution sale of his family home, by proposing and performing a plan that preserves the equity in the home that will be available for application on the judgment if he loses the appeal?

LIST OF PARTIES

The only parties to the proceeding in the Ninth Circuit Court of Appeals, and in the California District Court from which the appeal to the Ninth Circuit was taken, were those named in the caption of this Petition. They are Petitioner MASON H. ROSE, V and Respondent SUSAN T. FULTZ, a/k/a SUSAN THERESE FULTZ and SUSAN FULTZ-SMALL.

However, this action originated in the United States District Court for the District of Colorado, whose default judgment was registered in California. In addition to Petitioner, there were two other defendants in the Colorado District Court; both were dismissed at Respondent's request, at or before the entry of the default judgment. They were H. L. QUIST and H. L. QUIST MANAGEMENT AND DEVELOPMENT CORP.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

MASON H. ROSE, V, Petitioner

v.

SUSAN T. FULTZ, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner MASON H. ROSE, V ("Rose")
respectfully prays that a writ of certio-
rari issue to review the judgment and
opinion of the United States Court of
Appeals for the Ninth Circuit, which
dismissed the appeal as moot and was
entered on December 11, 1987.

OPINIONS BELOW

The Ninth Circuit's opinion is reported
at 833 F.2d 1380. That opinion, and the
Ninth Circuit's order denying rehearing,
are reproduced in Appendix C, commencing
respectively at App. 60a and 62a.

The order appealed from to the Ninth Circuit was the "Order Vacating Stay of Execution, Directing Sale of Real Property to Judgment Creditor, and Directing Distribution of Funds Upon Closing," filed on March 7, 1986, in and by the United States District Court for the Central District of California, where the Colorado District Court's default judgment had been registered. That order is unreported, and is reproduced in Appendix B, at App. 44a-51a.

The Colorado District Court's default judgment is unreported, and is reproduced in Appendix B, at App. 58a-59a. ^{1/}

JURISDICTION

Rose seeks review of the judgment and opinion of the Court of Appeals for the

^{1/} The Colorado default judgment refers to and was accompanied by "Findings of Fact and Order for Default Judgment," not relevant to the present petition, but reproduced in the Appendix to Rose's previous petition in No. 87-1559, at App. 25a-42a.

Ninth Circuit, filed and entered December 11, 1987, dismissing the appeal as moot. A timely Petition for Rehearing was denied on January 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION,

RULES AND STATUTES INVOLVED

The provisions involved include (1) the Due Process Clause of the Fifth Amendment to the United States Constitution; (2) Fed. R. Civ. P. 62, relating to the stay of proceedings to enforce a judgment, and in particular Rules 62(d) ("Stay Upon Appeal") and 62(f) ("Stay According to State Law"); (3) Fed. R. Civ. P. 69(a), relating to execution generally, "in accordance with the practice and procedure of the state in which the district court is held"; (4) Fed. R. App. P. 8(a) and (b), relating to stays pending appeal; (5) multiple provisions of the California

"Enforcement of Judgments Law" [Title 9 (of Part 2) of the California Code of Civil Procedure, commencing with section 680.010], including in particular the California homestead and execution laws which Rose contends the District Court refused to enforce; (6) other provisions of the California Code of Civil Procedure, including parts (commencing with section 872.210) of Title 10.5 (of Part 2), relating to the partition of real property, and parts (commencing with section 916) of Chapter 2 (of Title 12 of Part 2), relating to stays of enforcement and other proceedings pending appeal; and (7) California Civil Code section 5120.110, relating to the liability of community property for the debts of either spouse.

In the aggregate, the above provisions are too voluminous to reproduce here, so they are set forth separately, in Appendix A.

STATEMENT OF THE CASE

A. Federal Jurisdiction in First Instance.

Although the present appeal was to the Ninth Circuit from the Central District of California, this case began as a diversity action in the District of Colorado, filed on November 10, 1983 by Respondent SUSAN T. FULTZ ("Fultz").

The jurisdiction of the Colorado District Court was invoked under 28 U.S.C. section 1332, plaintiff Fultz being a citizen of Colorado, defendant Rose a citizen of California, and two other defendants citizens of Arizona. On December 11, 1984, Fultz obtained a default judgment against Rose, from the Colorado District Court, for \$464,753.

The jurisdiction of the California District Court was invoked under 28 U.S.C. section 1963, by Fultz' registration of her Colorado judgment in California.

B. Relation of This Petition to Rose's
Pending Petition in No. 87-1559.

Rose has previously (on March 16, 1988) filed another petition for certiorari, now pending in this Court as No. 87-1559. The two petitions are from different orders, by different panels of the Ninth Circuit, in different appeals from separate orders of the District Court. ^{2/} By coincidence, both panels dismissed the appeals as moot (for different reasons), and both denied petitions for rehearing within a few weeks of each other.

The previous petition, in No. 87-1559, relates to an appeal from a 7/15/85 order in which the District Court ruled that the Colorado default judgment was valid, rejecting Rose's jurisdictional challenge based on improper service of process. The Ninth Circuit dismissed the appeal, ruling

^{2/} Unless otherwise specified, references herein to "the District Court" are to the California District Court.

it was mooted by Rose's "voluntary general appearance" by filing a postjudgment Rule 60 motion in the Colorado District Court.

The present petition relates to an appeal from a 3/7/86 order in which the District Court refused to follow the homestead and execution laws of California, and ordered a private execution sale of a family dwelling to Fultz as judgment creditor, so she could resell the dwelling to a non-party third person. The Ninth Circuit dismissed the appeal, ruling it was mooted when Fultz resold the dwelling to the third person while the appeal was pending.

The two petitions (and the underlying District Court orders and the appeals from them) are interrelated, but only to a limited extent. If Rose can establish that the Colorado default judgment was void for lack of jurisdiction (either through the

previous petition in this Court, or in some other forum), then the execution order involved in the present petition is also void, as is the sale of the dwelling pursuant to that order.

On the other hand, if Rose cannot establish voidness for lack of jurisdiction, he can still prevail on the present petition, by showing that he is entitled to relief from the order for sale of the dwelling, because of the District Court's refusal to follow California homestead and execution law.

C. Summary of the Most Important Facts.

Rose appealed a federal district court order in this diversity action, for the execution sale of his family dwelling to judgment creditor Fultz. On appeal, Rose contended that, over his and Mrs. Rose's repeated objections, the District Court deliberately refused to follow applicable California homestead and execution laws.

Rose moved in the District Court for a partial stay of execution, limited to a stay of the sale of the dwelling, pending his appeal from the District Court's 7/15/85 order rejecting his jurisdictional challenge. The stay Rose requested was conditioned on his implementation of a plan that he proposed for the preservation of the equity in the dwelling that would be available for application to Fultz' judgment if she prevailed on appeal.

In support of his motion, Rose showed that he could not afford a bond that would have entitled him to a full stay. However, he also showed that he could pay interest, taxes and insurance premiums as required by his proposal, and he fulfilled those conditions during temporary stays granted by the District Court while his motion was pending.

The District Court refused to consider Rose's motion for a partial stay, and also

denied Rose's alternate motion to enforce the homestead laws by releasing the levy (because Fultz had failed to apply for the homestead hearing required before a dwelling could be sold) or setting in motion the required hearing procedures.

Instead, the District Court ordered a private sale of the dwelling to Fultz as judgment creditor, so could accept an offer to resell the dwelling to third persons, although (1) there had never been a public auction sale, as required by California execution laws; and (2) there had never been a homestead hearing or any of the determinations required at such a hearing (such as whether the dwelling qualified as a homestead, and if so what person(s) were entitled to the homestead exemption(s) and in what amount(s), and a determination of a minimum bid based on an estimate of the current fair market value of the property).

Rose filed a timely notice of appeal from the order for the sale of the dwelling, before the sale had been consummated by the execution, delivery and recording of a Marshal's deed to Fultz; all of those events took place after Rose notified both Fultz and the Marshal that the appeal had been filed, and that under California law there was an automatic statutory stay of the order by the filing of the appeal.

A few weeks later, during the pendency of the appeal, Fultz resold the dwelling to third persons. The purchasers were not parties to the action, but they had been present at a District Court hearing on the proposed private sale to Fultz, so they were fully aware of how Fultz acquired the property, and of Rose's contention that such a sale to Fultz was void.

The Ninth Circuit dismissed the appeal as moot, on the ground that Fultz' resale to non-party third persons precluded the

Court from granting any effective relief or reaching the merits of the appeal.

D. Additional Relevant Facts.

Fultz obtained her Colorado default judgment on 12/11/84. On 12/18/84, Fultz recorded an abstract of the judgment with the Los Angeles County Recorder (CR 79 at 23). Under California law (CCP 697.060, CCP 697.310 and CCP 697.340, ^{3/} App. A at 7a-8a), that recording created a judgment lien, which attached to the Rose home as real property in Los Angeles County, California. The home was owned jointly by Rose and his estranged wife, and Mrs. Rose was living in it with their three minor children.

After registering her judgment in California on 1/17/85, Fultz obtained a writ of execution issued by the District Court

^{3/} Citations in this format ("CCP," followed immediately by a number) are to sections of the California Code of Civil Procedure.

on 1/31/85. Because the Rose Home was community property of Mr. and Mrs. Rose, under California law (Civil Code section 5120.110, App. A at 43a), Fultz could and did levy on the interests of both of them, even though Fultz' default judgment was only against Mr. Rose. Acting under written instructions from Fultz, the United States Marshal levied on Rose's interest in the home on 3/21/85, and on Mrs. Rose's interest in the home on 3/29/85.

Fultz' instructions to the Marshal (CR 63, Exs. A and B) failed to comply with CCP 687.010(a) (App. A at 5a), which requires "[t]he judgment creditor [to] give the levying officer instructions in writing [containing] the information needed or requested by the levying officer to comply with the [California Enforcement of Judgments Law]], including but not limited to . . . a statement whether the property is a dwelling" (emphasis added).

Fultz' instructions failed to state that the property was a dwelling, and the Marshal did not give the notice required by California law (CCP 704.750(a), App. A at 21a-22a) in connection with a levy on a dwelling. That section requires the levying officer to notify the judgment creditor "that the property will be released unless," within 20 days, the judgment creditor applies to the court for an order of sale at a homestead hearing to be noticed and conducted in accordance with specified procedures. Fultz never made the required application, nor did the Marshal "release the dwelling" (Ibid.).

The required homestead hearing was never held, despite the repeated protests of Rose and Mrs. Rose. If such a hearing had been held promptly after the levy (as required by CCP 704.770, App. A at 24a), the Rose home would have qualified as a "homestead" (as defined in CCP 704.710(c),

App. A at 18a-19a), and both Rose and Mrs. Rose would have been entitled to the substantive protections of the California homestead laws, ^{4/} since (1) Mrs. Rose was then Rose's spouse; and (2) the Rose home was then the principal dwelling in which Mrs. Rose had resided continuously at all times on and after 12/18/84 (the date on which Fultz' lien attached to the property).

In August 1985, Fultz attempted to proceed with the execution sale of the Rose home without even notifying Rose's counsel. Instead, on 7/30/85 (soon after the

^{4/} As to Rose, the Rose home would have continued to qualify as a homestead if the determination had been made at any time through at least 10/31/85 (the date on which his divorce from Mrs. Rose became final), and thereafter as well if Fultz' failure to comply with the law (and the resulting delay of the determination) were held to estop her from denying his homestead rights. As to Mrs. Rose, the Rose home would have qualified as a homestead no matter when the determination was made, because she resided there continuously until after the order for sale.

7/15/85 order appealed from in No. 87-1559, rejecting Rose's challenge to jurisdiction), Fultz obtained an ex parte "Order Granting Access to Real Property to Conduct Public Sale Under Writ of Execution" (CR 28); Fultz did not notify Rose of the ex parte application, as required by the District Court's Local Rule 7.18.1, nor did she notify Rose of the order. It ordered the City of Rolling Hills and the Rolling Hills Community Association to permit access to the home to conduct a public auction on 8/22/85; the order provided for service on the city and the association, but not on Rose (CR 28 at 1-2).

The public auction did not take place on 8/22/85 or at any other time. Instead, Fultz ultimately obtained the 3/7/86 order appealed from, which provided for a private sale to her as judgment creditor.

There was no public auction on 8/22/85 because it was aborted at the eleventh

hour. Fultz had advertised that the sale was set for that date, with a minimum bid of \$675,000. ^{5/} Rose's counsel chanced upon the ad in the Los Angeles Times. On 8/12/85, Rose filed a bankruptcy petition under Chapter 11, and immediately notified Fultz' counsel, by telephone, of the filing and the automatic bankruptcy stay.

Nevertheless, Fultz proceeded to advertise the sale (of the interests of both Rose and Mrs. Rose in the home), and her counsel went to the home on 8/22/85, intending to conduct a sale of Mrs. Rose's interest. At the last minute, and at the insistence of Rose's bankruptcy counsel, the United States Attorney advised the Marshal not to proceed.

^{5/} Apparently the \$675,000 minimum bid was set by Fultz unilaterally. It was not set in accordance with the homestead laws (see, e.g., CCP 704.780, App. A at 26a-27a, and CCP 704.800(b), App. A at 31a), which include provisions designed to protect California homeowners from forced sales of their homes at far less than fair market value.

Rose's bankruptcy automatic stay was short-lived. In the bankruptcy court, Fultz sought and obtained relief from the stay, permitting her to proceed with the sale of the Rose home, subject only to any stay Rose might obtain from the District Court.

Rose did obtain two further stays--both temporary--from the District Court. He first asked for and received an ex parte temporary stay of the sale of the home (to permit him to notice a hearing on a formal motion for a further indefinite stay), on conditions (such as the payment of interest) similar to those of the later stay.

The second temporary stay was granted, for 90 days only, instead of the indefinite stay Rose requested in his formal motion heard 11/25/85. In support of that motion, Rose showed (by declarations) he could not afford a full bond, and he proposed the detailed plan contained in the

11/25/85 order (App. B at 54a-57-a), to preserve his equity in the home.

In opposition to the Motion, Fultz' primary factual contentions were (1) that she needed the money an immediate sale would bring her; and (2) that, notwithstanding the stay, she had employed a real estate agent and obtained buyers (Mr. and Mrs. Hawkins) who had offered to buy the Rose home for \$700,000 cash. Rose questioned the relevance of these facts, and also showed the \$700,000 offer was far below the \$800,000 appraisal that had been submitted by Rose (as well as the \$765,000 appraisal submitted by Fultz) to the bankruptcy court in September of that year, in connection with the hearing on relief from the bankruptcy stay.

In support of Rose's motion, Mrs. Rose submitted a brief arguing that the home could not be sold without complying with the requirements of the homestead laws,

which Fultz was "cavalierly disregarding" (CR 46 at 3). At the hearing, Rose argued the homestead laws had not been complied with, concluding (11/25/85 RT at 6) "There should be, at the very least, a stay, and, at the most, a release of the dwelling now until they go in to proceed properly." The District Court brushed aside these requests to follow California law with this rejoinder (Id. at 6):

THE COURT: Why do we really need that? Why can't this be worked out? If the plaintiffs are correct in indicating that they have secured a willing and able buyer, \$700,000 cash, that's more than what you've suggested in your papers."

The Court had the facts wrong; Rose tried to set them straight, pointing out that his 1985 appraisal had been \$800,000 cash. But the Court still refused to order a homestead hearing or consider the indefinite stay requested by Rose. Instead, Rose was granted a stay, but only for 90 days, and only to see if he "can

come up with something better. If not, then we'll go ahead with the \$700,000" (11/25/85 RT at 10).

A few days after the 11/25/85 hearing, Mr. and Mrs. Hawkins increased their offer to \$750,000, and Fultz requested that the stay be ended so she could accept. The Court refused, permitting the stay to continue for the full 90 days.

During those 90 days, Rose did not try to "come up with something better". Instead, he made the alternate motions described at 9-10 above, persisting in his efforts to save the property by seeking a an indefinite stay, or in the alternative the enforcement of his rights under California law. Those efforts were unsuccessful, an the District Court made the order of 3/7/85 (App. B at 44a-51a), providing for a private execution sale to Fultz so she could resell to Mr. and Mrs. Hawkins. That was the order appealed from here.

At the 3/3/85 District Court hearing on Rose's motions, Fultz disclosed that she had reached an agreement with Mrs. Rose, under which (1) Fultz would release her levy as to Mrs. Rose; and (2) Mrs. Rose would sell to Fultz, by quitclaim deed, her half interest in the Rose home, for the sum of \$45,000 (the amount of the homestead exemption that Rose and/or Mrs. Rose might have been awarded if there had been a homestead hearing under California law.

The 3/7/85 order accepted Fultz' bid (as a credit against her judgment, under CCP 701.590, App. A at 12a) of about \$321,00), calculated as the difference between a \$750,000 selling price and a total of about \$429,000 in prior liens; the prior liens were paid off out of the proceeds of Fultz' resale, but a lien that was a few weeks subsequent to Fultz' lien was not.

The 3/7/85 order recited (App. B at 46a) that \$750,000 was "the appraised market value of the property." The only \$750,000 in the record was then more than two years old, and both sides had submitted higher appraisals for a September 1985 bankruptcy hearing. Even those higher appraisals (\$800,000 and 765,000) were about six months old at the time of the hearing, seven months old at the time of the Marshal's deed to Fultz in April, and eight months old when Fultz' resale was consummated in May of 1986.

Thus there was no current appraisal (as would have been required by the homestead law), although 1985-86 was a period of falling interest rates (as found by the Court, App. B at 46a) and resulting higher home values in California.

Within a week after filing his notice of appeal for the 3/7/85 order, Rose filed a "Motion for Order Enforcing Rose's Right

to California Automatic Stay, . . . [FRCP 62(f); Cal. CCP 916(a)]" (CR 79). The motion contended the stay was automatic under California law, "because the March 7 Order does not require Rose to do anything, and because he is neither in possession nor in control of the real property that is the subject of the order" (CR 79 at 5). Rose further stated that he was requesting an order, although the stay was automatic, and not a matter of discretion or court order, because "we would like to have a court order to show to the Marshal, to Fultz, or to any third person, so they will not have to take our word that the March 7 Order is stayed" (CR 79 at 5). In a supporting declaration (CR 78 at 1-2), Rose said he was neither in possession nor in control of the home, which was in the sole possession of Mrs. Rose.

The motion was heard and denied on 4/18/86. In responding to it on that

date, Fultz contended the motion was too late, disclosing that the Marshal's deed to her had been recorder on April 9 (two days after Rose filed the appeal and notified the Marshal of the automatic stay, by personal delivery of a written notice to the Marshal, with a copy to Fultz' counsel by Express Mail.

The District Court denied the motion by Minute Order of 4/18/86 (CR 82), ruling that "Sec. 917.1 applies", referring to CCP 917.1 (App. A at 40a), under which the perfecting of an appeal does not automatically stay enforcement of a money judgment. At the hearing, the District Court also said that it doubted that it still had jurisdiction over the motion, because of the transfer to Fultz on April 9.

Rose did not attempt to appeal that ruling, but did argue (in his appeal to the Ninth Circuit, from the March 7 Order) that the automatic stay was among the laws

under which he was entitled to relief in that Court.

In dismissing the appeal as moot, the Ninth Circuit order stated (833 F.2d at 1380):

Fultz sold the Rose property to Mr. and Mrs. Hawkins in compliance with the district court's March 7, 1986 order. Because Mr. and Mrs. Hawkins are not parties to this action, we are no longer able to grant any effective relief from that order or to reach the merits of this appeal.

As part of the same order (Ibid.), the Ninth Circuit vacated the District Court's March 7 Order, but did so nonretroactively, so the vacation would have "no legal effect on actions or conduct already undertaken in reliance on or under the authority of that order."

REASONS FOR GRANTING THE WRIT

- A. Review Is Needed to Resolve the Conflict Between Circuits as to Whether a Resale to a Non-Party Automatically Moots an Appeal from an Order for the Sale of Property to the Judgment Creditor in a Diversity Action, Without Regard to the Continuing Possibility of Effective Relief Under State Law.

Rose seeks review of an important question of mootness on appeal, as to whether a void or improper district court order, for sale of property to the judgment creditor, is insulated from appeal by resale of the property to a third person. The Fifth Circuit has correctly ruled that the appeal is not moot, so long as relief is still possible under state law. The Ninth Circuit here has rendered a decision in conflict with that correct ruling of the Fifth Circuit.

1. There is a Conflict with the Fifth Circuit, Apparently Due to the Ninth Circuit's Failure to Recognize That This Is a Diversity Action.

The Ninth Circuit's brief order here begins (833 F.2d at 1380) with a correct

statement that an appeal is moot when intervening events "leave the appellate court unable to grant effective relief." As authority for that statement, the Court cites a bankruptcy case, In re Combined Metals Reduction Co., 557 F.2d 179, 187 (9th Cir. 1977).

Without further citation, the Ninth Circuit order proceeds to conclude that it can "no longer grant effective relief" here" because of Fultz' resale to third persons who are not parties to the action. But that result does not automatically follow in this diversity action, as it did in the Combined Metals bankruptcy appeal.

That is the distinction overlooked by the Ninth Circuit here, but correctly recognized by the Fifth Circuit in Citibank, N.A. v. Data Lease Financial Corp. 645 F.2d 333, 336 (5th Cir. 1981). Based on that distinction, the Citibank Court held

that mootness of an appeal from such an order in a diversity action depends on the law of the state in which the district court sits, based on the following analysis (645 F.2d at 336) (emphasis added):

Relying on . . . Lee-Vac, . . . [Citibank] asserts that the intervening rights of the third party purchaser preclude this court from granting substantial relief to Data Lease and that the appeal is therefore moot. We disagree.

Citibank's reliance on Lee-Vac is misplaced. That case was an appeal from an order in a bankruptcy proceeding governed by Rule 805 of the Rules of Bankruptcy Procedure, which provides in pertinent part that "[u]nless an order approving a sale of property . . . is stayed pending appeal, the sale to a good faith purchaser . . . shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser . . . knows of the pendency of the appeal." By contrast the instant case is a diversity action, and the nature of the rights created by the orders of sale . . . is determined by the law of Florida. Erie R.R. v. Tompkins, 304 U.S. 64 . . . (1938). It is to that law that we must turn to determine whether the subsequent sale vested the third party purchaser with rights that would not be affected by a reversal of either the sale or the confirmation order.

Thus the hasty conclusion of Ninth Circuit here conflicts with the reasoned conclusion of the Fifth Circuit in Citibank. The Supreme Court should resolve that conflict by adopting the Citibank rule. The judgment creditor's resale should not automatically moot an appeal. The judgment debtor must not be deprived of his right to appeal a void or improper sale order, if--as here and in Citibank--relief is still possible under state law.

2. Here Relief Is Still Possible Under California Law.

a. In California, a Purchaser from the Judgment Creditor Gets No Better Title Than His Grantor.

Citibank went on to conclude that the appeal was not moot under Florida law. However, because there was no Florida law on the precise point at issue, the Fifth Circuit turned to "the clear weight of authority" elsewhere, as exemplified by the California case that is decisive here (at 645 F.2d 336-7; emphasis added):

Turning to cases from other jurisdictions, however, the clear weight of authority is that in the absence of a statute to the contrary the reversal on appeal of an order directing the sale of property defeats the title of one who obtained the property from a party who purchased it at the judicial sale, regardless of the ground for reversal. This rule is based upon the general principle that one ordinarily cannot convey a better title than he himself has. Because the . . . purchaser's title is defeasible his grantee's title is also defeasible. See DiNola v. Allison, 143 Cal. 106, 76 P. 976 (1904); Marks v. Cowles, 61 Ala. 299 (1878). Because a reversal by this court of either of the district court's orders would defeat Citibank's purchaser's title and entitle Data Lease to possession of the stock, no aspect of this appeal is moot.

We recognize that California now has a statute under which title acquired at a judicial sale can only be defeated on certain specified grounds, rather than "regardless of the ground for reversal." But that does not change the holding for which Citibank cites Di Nola v. Allison, supra, 143 Cal. 104 (1904); here, because Fultz' title is defeasible, the title of her grantees is also defeasible. That

rule is not dependent on the grantees' knowledge of the defect.

"The grantee is charged with notice of the deeds and documents from which he derails his title. When he purchases from the plaintiff in the execution he is presumed to know the course of proceedings and state of the record from which the title of his grantor proceeded, and he is presumed to know, too, that the right of the defendant is to take an appeal within the statutory period, and also the consequences of the successful prosecution of this right; and he must be supposed to purchase with reference to these things." Di Nola, at 143 Cal. 114, quoting Reynolds v. Harris, 14 Cal. 667 (1860).

Here there is no need for the Di Nola presumptions. Mr. and Mrs. Hawkins had actual knowledge of the proceedings in the

District Court, on the record of the court hearing they attended (12/16/85 RT at 7), and we long ago advised them of our contentions on this appeal.

- b. A California Statute Expressly Entitles the Judgment Debtor to Relief in This Situation, by Restitution and/or Setting Aside the Sale to the Judgment Creditor.

The California statute we referred to (in the preceding section, at 31) is CCP 701.680 (App. A at 13a-14a). Under that section, Fultz' title is defeasible, because (1) "the purchaser at the sale [was] the judgment creditor" and (2) the gravamen of this appeal is to show that "the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason".

In that situation, CCP 701.680(c)(1) entitles the judgment creditor to bring an action to set aside the sale. Fultz complained below that this appeal was not the

action contemplated by the statute. But a separate action should not be required to accomplish a result that can be accomplished in a direct appeal. The question could and should have been decided on this appeal, so as to "save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object." Butler v. Eaton, 141 U.S. 240, 244 (1891).

Even if we do not succeed in establishing that Fultz' title is defeasible, CCP 701.680 expressly provides that "The judgment debtor . . . may recover damages caused by the impropriety."

The possible right to damages is itself sufficient to avoid mootness of the appeal. A surviving money claim is sufficient to preserve the appeal, even if other requested relief is no longer available. Powell v. McCormick, 395 U.S. 486, 496-497 (1969).

Here Rose's damages include (1) the failure to pay him all or part of the \$45,000 homestead exemption that was paid to his ex-wife, without following the California homestead procedures; (2) the failure to pay off a subsequent judgment lien, as required by the homestead law's provisions that all liens must be paid off out of the proceeds; and (3) the loss to him from the sale of the homestead at less than the minimum bid that should have been set at a proper homestead hearing, based on a current appraisal instead of the two-year-old appraisal used here.

c. The Sale Was Void; It Violated an Express Statutory Prohibition of Judicial Sale of a Dwelling, Except Pursuant to Prescribed Homestead Procedures.

Fed. R. Civ. P. 69(a) (App. A at 2a) mandates that execution on a federal judgment "shall be in accordance with the practice and procedure of the state in which the district court is held, . . ."

California's CCP 704.740(a) (App. A at 21a) provides (emphasis added):

(a) . . . [T]he interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article.

That statute expressly forbids an execution sale of a dwelling, without following the prescribed procedures for determining whether that dwelling qualifies as a homestead, and for affording to the homeowner the protections of the homestead law. Yet that is what happened here, despite repeated objections.

Those protections are expressions of a strong public policy to safeguard the exemptions granted to debtors under California execution laws. For example, that public policy is expressed in CCP 703.040 (App. A at 16a) (emphasis added):

A purported contractual or other prior waiver of the exemptions provided by this chapter or by any other

statute, other than a waiver by failure to claim an exemption required to be claimed or otherwise made at the time enforcement is sought, is against public policy and void.

Consistent with that strong public policy, and with California holdings under analogous statutes, the sale to Fultz here --in violation of an express statutory prohibition of such a sale--was void. See Van Bogaert v. Avery, 271 Cal. App. 2d 492, 495 (1969).

In the Courts below, Fultz made baseless claims that Rose had waived any homestead rights he may have had. Those claims are not relevant to the mootness question under discussion here. The merits of those claims should have been determined at the homestead hearing mandated by California law.

d. A California Statute Expressly Provides a Right to Appeal an Order for Sale of a Dwelling.

Among the protections of California homestead and execution laws, that were

ignored by the courts below, was an express statutory provision of a right to appeal the order for sale of the home. According to CCP 703.600 (App. A at 17a), incorporated in the homestead provisions by CCP 704.930 (App. A at 32a), "An appeal lies from any order made under this article . . ."

California law thus entitles Rose to this appeal, and to relief if his appeal is successful. The appeal is therefore not moot, and dismissing it for mootness deprives him of property without due process of law.

e. A California Statute Expressly Provides for an Automatic Stay of the Order Appealed from Here.

Stays in a district court are governed by Fed. R. Civ. P. 62 (App. A at 1a-2a).

Rule 62(f) provides that:

In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the

district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state."

Rule 62(f) is applicable to a registration proceeding such as this. United States, etc. v. Home Indemnity Co., 549 F.2d 10, 14 (7th Cir. 1977). Furthermore, California is a "state in which a judgment is a lien upon the property of the judgment debtor", and here Fultz had a judgment lien on the Rose home, perfected 12/18/84. Therefore, under Rule 62(f), Rose was entitled to the same stay rights as in a California state court.

California CCP 916(a) (App. A at 39a) provides (emphasis added):

"(a) Except as provided in Sections 917.1 through 917.9 . . . , the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, . . ."

The emphasized words show that it is the appeal itself, rather than any order of the court, which triggers the stay,

unless one of the specified exceptions is applicable. Here the March 7 Order did not require Rose to do anything, so the stay was automatic (rather than by court order), and no bond was required. Estate of Dabney, 37 Cal.2d 402, 407 (1951). No exercise of court discretion was necessary. Id., 37 Cal.2d at 408.

CCC 916(a) refers to specified statutory exceptions, but none is applicable here. CCP 917.4 (App. A at 41a-42a), relating to orders for the sale of real property, is not applicable, because Rose's declaration showed he was not in possession or control of the Rose home (Wynonah Rose was, and had been since their separation in 1983). See Witkin, 9 California Procedure (3d ed. 1985), Appeal Sec. 188, at pp. 200-201. Furthermore, the March 7 Order did not order Rose to sell, convey or deliver possession of the home. The Marshal had already levied on

his interest in March 1985, so it was the Marshal who was ordered to deed Rose's interest to Fultz.

The District Court mistakenly thought the exception in CCP 917.1 was applicable. CCP 917.1 requires a bond in a specified amount to stay a judgment or order if it "is for money or directs the payment of money". Here the original Colorado default judgment was a money judgment, but the present appeal was not from that judgment and does not affect it, or any enforcement of it other than in connection with the Rose home. Rather, the present appeal was from the March 7 Order, which is essentially "one directing the sale of real property." Owen v. Pomona Land Etc. Co., 124 Cal. 331, 334 (1899) [granting a motion to vacate and set aside the sale, and to quash the execution, and permitting that motion to be made in the appellate court].

3. If the Colorado Default Judgment Was Void, the Order for Sale of the Rose Home Was Also Void.

In his previous petition No. 87-1559, Rose seeks to establish that the Colorado default judgment was void for lack of jurisdiction. If he succeeds in that effort (either in this Court, or in some other forum, such as the Tenth Circuit or the Colorado District Court), then the orders of the California District Court (including the home sale order appealed from here), would be equally void for lack of jurisdiction.

That voidness would be a matter of federal due process, so California law could not constitutionally validate the sale. Therefore, the present appeal could not be moot unless and until that voidness issue is finally determined against Rose.

4. The Order Here Is "Capable of Repe-
tition, Yet Evading Review."

This important mootness doctrine, as well as the Supreme Court's statement of

its essential elements, were summarized recently in Johansen v. San Diego County District Council, 745 F.2d 1289, 1292 (9th Cir. 1984):

An action is not moot if it is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 415 . . . (1911). The satisfaction of this test requires the combination of two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 . . . (1975); . . .

In this case, the "challenged action," which was the ten-day injunction, was "too short to be fully litigated prior to its cessation or expiration." This part of the Weinstein test is often satisfied when a court order, by its own terms, expires in a few days.

Here both Weinstein tests are satisfied. As in Johansen, this order was of a duration that was simply too short to permit full litigation of the appeal. That was amply demonstrated by Fultz' successful completion of the sale and resale,

both within a few days after she had notice that this appeal had been filed. By the very terms of the order appealed from, the sale to Fultz was to be implemented "forthwith", and her resale "within 90 days of this Order" contemplated a much shorter period than the 266-day gestation period held to be sufficient in Roe v. Wade, 410 U.S. 113, 125 (1973).

As to the second Weinstein test, Rose could be subjected to the same kind of short-term order again, by the same District Court in this same action. If Rose should succeed in getting a retrial (such as in his pending Tenth Circuit Appeal, or from this Court in No. 85-1559), and if Fultz gets another judgment on remand and Rose then owns a home in California, Rose could again be deprived of homestead rights by an order that could not be appealed before it had been carried out.

B. Review Should Be Granted, in the Exercise of the Power of Supervision, to Correct and Prevent the Deliberate Refusal to Follow Applicable State Law.

The threat of depriving debtors of their homestead rights, by federal courts that refuse to obey state law, is important enough to warrant review here.

Unfortunately, here that threat has become reality. The District Court not only refused to follow the homestead laws of California--it did not even permit the public auction required for an execution sale of any property. The Ninth Circuit tacitly condoned that lawlessness, by refusing to even rule on it once it had been consummated by Fultz' resale.

We have already seen that Fed. R. Civ. P. 69(a) requires federal district courts to follow execution "practice and procedure of the state in which the district court is held."

Federal courts are not above the law of

the states in which they sit. Such flouting of the law should not be countenanced by the Supreme Court. In the exercise of its power of supervision, this Court can and should promptly squelch any such flouting of the federal and state rules of execution.

- C. Review should be granted, to establish a rule that a judgment debtor who cannot afford a full stay may stay the execution sale of his family home by proposing and performing a plan that preserves the equity that will be available for execution if the plaintiff wins the appeal.

Here the District Court refused to consider Rose's motion for an indefinite stay of the sale of the home. Although the sale order contained findings, none of them addressed the issues relevant to the granting of the partial stay requested here. See, e.g. United States v. Kurtz, 528 F.Supp. 1113, 1115 (E.D. Pa. 1981).

A plaintiff-appellee is not entitled to immediate payment, but rather to protection of her ultimate right to recover if she prevails on appeal. Federal Prescription Service v. American Pharmaceutical Assn., 636 F.2d 755, 761 (D.C. Cir. 1980).

There is not much law on this important question, and guidance from the Supreme Court is needed to protect homeowners from abuses such as those imposed here.

If certiorari is granted, Rose will address this question at length in his brief on the merits.

CONCLUSION

For these reasons, certiorari should be granted.

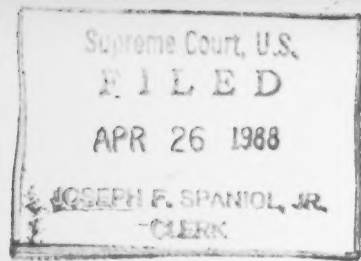
Respectfully submitted,

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Counsel of Record
For Petitioner

April 26, 1988

87-1788



No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

MASON H. ROSE, V,

Petitioner,

v.

SUSAN T. FULTZ,

Respondent.

**APPENDIX
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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April 26, 1988

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APPENDIX A:
CONSTITUTIONAL PROVISION,
RULES AND STATUTES INVOLVED

A. UNITED STATES CONSTITUTION

Fifth Amendment, Due Process Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

B. FEDERAL RULES OF CIVIL PROCEDURE

Rule 62. Stay of Proceedings to
Enforce a Judgment.

.

(d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

.

(f) STAY ACCORDING TO STATE LAW. In

any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

. . . .

Rule 69. Execution.

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that

it is applicable. . . .

C. FEDERAL RULES OF APPELLATE PROCEDURE

Rule 8. Stay or Injunction Pending Appeal.

(a) STAY MUST ORDINARILY BE SOUGHT IN THE FIRST INSTANCE IN DISTRICT COURT; MOTION FOR STAY IN COURT OF APPEALS. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, . . . must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon,

and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court

(b) STAY MAY BE CONDITIONED UPON GIVING OF BOND; PROCEEDINGS AGAINST SURETIES. Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. . . .

D. CALIFORNIA CODE OF CIVIL PROCEDURE

Title 9 [of Part 2]. ENFORCEMENT
OF JUDGMENTS.

Division 1. DEFINITIONS AND
GENERAL PROVISIONS.

Chapter 1. SHORT TITLE AND
DEFINITIONS.

Section 680.010. Short title.

This title shall be known and may be cited as the Enforcement of Judgments Law.

Chapter 7. LEVYING OFFICERS.

Section 687.010. Form, Content and Effect of Instructions.

(a) The judgment creditor shall give the levying officer instructions in writing. . . . The instructions shall contain the information needed or requested by the levying officer to comply with the provisions of this title, including but not limited to:

(1) An adequate description of any property to be levied upon.

(2) A statement whether the property is a dwelling.

(3) If the property is a dwelling, whether it is real or personal property.

(b) Subject to subdivision (c), the levying officer shall act in accordance with the written instructions to the extent the actions are taken in conformance

with the provisions of this title.

(c) Except to the extent the levying officer has actual knowledge that the information is incorrect, the levying officer may rely on any information contained in the written instructions.

Division 2. ENFORCEMENT OF MONEY
JUDGMENTS.

Chapter 1. GENERAL PROVISIONS.

Article 1. Property Subject
to Enforcement of Money
Judgment.

Section 695.020. Community Property.

(a) Community property is subject to enforcement of a money judgment as provided in Title 8 commencing with Section 5100) of Part 5 of Division 4 of the Civil Code.

(b) Unless the provision or context otherwise requires, if community property that is subject to enforcement of a money judgment is sought to be applied to the satisfaction of a money judgment:

(1) Any provision of this division that applies to the property of the

judgment debtor . . . also applies to the community property interest of the spouse of the judgment debtor

(2) Any provision of this division that applies to property in the possession or under the control of the judgment debtor also applies to community property in the possession or under the control of the spouse of the judgment debtor.

Chapter 2. LIENS.

Article 1. General Provisions.

Section 697.060. Recording of Federal Court Judgment.

(a) An abstract or certified copy of a money judgment of a court of the United States that is enforceable in this state may be recorded to create a judgment lien on real property pursuant to Article 2 (commencing with Section 697.310).

. . . .

Article 2. Judgment Lien on Real Property.

Section 697.310. Creation and Duration
of Judgment Lien Based on Money
Judgment Generally.

(a) Except as otherwise provided by statute, a judgment lien on real property is created under this section by recording an abstract of a money judgment with the county recorder.

. . . .

Section 697.340. Property Attached by
Real Property Judgment Lien.

Except as provided in Section 704.950 [which is headed "When Judgment Lien Does Not Attach to Declared Homestead"]:

(a) A judgment lien on real property attaches to all interests in real property in the county where the lien is created (whether present or future, vested or contingent, legal or equitable) that are subject to enforcement of the money judgment against the judgment debtor . . . at the time the lien was created

Chapter 3. EXECUTION.

Article 4. Methods of Levy.

Section 700.015. Levy on Real Property.

(a) To levy on real property, the levying officer shall record with the recorder of the county where the real property is located a copy of the writ of execution and a notice of levy that describes the property levied upon and states that the judgment debtor's interest in the described property has been levied upon. . . .

Article 6. Sale and
Collection.

Section 701.540. Notice of Sale of
Real Property Interest.

(a) Notice of sale of an interest in real property shall be in writing, shall state the date, time, and place of sale, shall describe the interest to be sold, and shall give a legal description of the real property and its street address or other common designation, if any. . . .

(b) Not less than 20 days before the date of sale, notice of sale of an

interest in real property shall be served, mailed, and posted by the levying officer as provided in subdivisions (c), (d), (e), and (f).

(c) Notice of sale shall be served on the judgment debtor. Service shall be made personally or by mail.

. . . .

(g) Notice of sale shall be published pursuant to Section 6063 of the Government Code, with the first publication at least 20 days prior to the time of sale, in a newspaper of general circulation published in the city in which the real property . . . is situated If no newspaper of general circulation is published in the city . . ., notice of sale shall be published in a newspaper of general circulation in the county in which the real property . . . is situated.

. . . .

Section 701.555. Advertisement of Sale.

In addition to the notice of sale required by this article, the judgment creditor may advertise the sale in the classified or other advertising section of a newspaper of general circulation or other publication and may recover reasonable costs of such advertising. The judgment debtor may also advertise the sale at the judgment debtor's own expense.

Section 701.560. Effect of Failure to Give Notice of Sale.

(a) Failure to give notice of sale as required by this article does not invalidate the sale.

. . . .

Section 701.570. Requirements for Sale of Property.

(a) A sale of property shall be held at the date, time, and place specified in the notice of sale, which shall be in the county where the property . . . is situated and between the hours of nine in the

morning and five in the afternoon. . . .

(b) The sale shall be made at auction to the highest bidder.

. . . .

Section 701.590. Form of Payment;
Creditor's Bid.

(a) Except as otherwise provided in this section, the purchaser at a sale shall pay in cash or by certified check or cashier's check.

(b) The judgment creditor may bid by giving the levying officer a written receipt crediting all or part of the amount required to satisfy the judgment, except that the levying officer's costs remaining unsatisfied and the amount of . . . exempt proceeds, and any other claim that is required by statute to be satisfied, shall be paid in cash or by certified check or cashier's check.

. . . .

Section 701.680. Sale absolute;
reversed, vacated or set aside
judgment; irregularities in
proceedings; remedies.

(a) Except as provided in paragraph (1) of subdivision (c), a sale of property pursuant to this article is absolute and may not be set aside for any reason.

(b) If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment.

(c) If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason:

(1) The judgment debtor . . . may commence an action within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment

creditor. Subject to paragraph (2), if the sale is set aside, the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor is entitled to interest on the amount of the judgment as so revived as if the sale had not been made.

(2) The judgment debtor . . . may recover damages caused by the impropriety. If damages are recovered against the judgment creditor, they shall be offset against the judgment to the extent the judgment is not satisfied. . . .

Chapter 4. EXEMPTIONS.

Article 1. General Provisions.

Section 703.010. Application of Exemptions.

Except as otherwise provided by statute:

(a) The exemptions provided by this chapter or by any other statute apply to all procedures for enforcement of a money

judgment.

. . . .

Section 703.020. Persons Who May Claim Exemptions.

(a) The exemptions provided by this chapter apply only to property of a natural person.

(b) The exemptions provided in this chapter may be claimed by any of the following persons:

(1) In all cases, by the judgment debtor

(2) In the case of community property, by the spouse of the judgment debtor, whether or not the spouse is also a judgment debtor under the judgment.

Section 703.030. Time and Manner for Claiming Exemption.

(a) An exemption for property that is described in this chapter or in any other statute as exempt may be claimed within the time and in the manner prescribed in the applicable enforcement procedure. If

the exemption is not so claimed, the exemption is waived and the property is subject to enforcement of a money judgment.

Section 703.040. Illegality Generally of Waiver of Objection.

A purported contractual or other prior waiver of the exemptions provided by this chapter or by any other statute, other than a waiver by failure to claim an exemption required to be claimed or otherwise made at the time enforcement is sought, is against public policy and void.

Article 2. Procedure for
Claiming Exemptions
After Levy.

Section 703.510. Application of
Article.

(a) Except as otherwise provided by statute, property that has been levied upon may be claimed to be exempt as provided in this article.

. . . .

Section 703.520. Making of Claim of
Exemption.

(a) The claimant may make a claim of

exemption by filing with the levying officer a claim of exemption The claim shall be made within 10 days after the date the notice of levy on the property claimed to be exempt was served on the judgment debtor.

. . . .

Section 703.600. Appeal.

An appeal lies from any order made under this article and shall be taken in the manner provided for appeals in the court in which the proceeding takes place.

Article 4. Homestead
Exemption.

Section 704.710. Definitions.

As used in this article:

(a) "Dwelling" means a place where a person resides and may include but is not limited to the following:

(1) A house together with the out-buildings and the land upon which they are situated.

. . . .

(b) "Family unit" means any of the following:

(1) The judgment debtor and the judgment debtor's spouse if the spouses reside together in the homestead.

(2) The judgment debtor and at least one of the following persons who the judgment debtor cares for or maintains in the homestead:

(A) The minor child . . . of the judgment debtor or the judgment debtor's spouse or the minor child . . . of a . . . former spouse.

. . . .

(3) The judgment debtor's spouse and at least one of the persons listed in paragraph (2) who the judgment debtor's spouse cares for or maintains in the homestead.

(c) "Homestead" means the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on

the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead. . . .

Section 704.720. Exemption of
Homestead and Proceeds Thereof.

(a) A homestead is exempt from sale under this division to the extent provided in Section 704.800.

(b) If a homestead is sold under this division . . . , the proceeds of a sale . . . are exempt in the amount of the homestead exemption provided in Section 704.430. . . .

(c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt

Section 704.730. Amount of Homestead
Exemption.

(a) The amount of the homestead exemption is one of the following:

. . . .

(2) Forty-five thousand dollars (\$45,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

. . . .

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) . . . of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists

of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

Section 704.740. General Requirements
for Sale of Dwelling.

(a) . . . [T]he interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article.

. . . .

Section 704.750. Application for Order
for Sale of Dwelling.

(a) Promptly after a dwelling is levied upon . . . , the levying officer shall serve notice on the judgment creditor that

the levy has been made and that the property will be released unless the judgment creditor complies with the requirements of this section. Service shall be made personally or by mail. Within 20 days after service of the notice, the judgment creditor shall apply to the court for an order for sale of the dwelling and shall file a copy of the application with the levying officer. If the judgment creditor does not file the copy of the application for an order for sale of the dwelling within the allowed time, the levying officer shall release the dwelling.

. . . .

Section 704.760. Application for Order
for Sale of Dwelling.

The judgment creditor's application shall be made under oath, shall describe the dwelling, and shall contain all of the following:—

(a) A statement whether or not the records of the county tax assessor indicate

that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling and the person or persons who claim any such exemption.

(b) A statement, which may be based on information and belief, whether the dwelling is a homestead and the amount of the homestead exemption, if any, and a statement whether or not the records of the county recorder indicate that a homestead declaration under Article 5 (commencing with Section 704.910) that describes the dwelling has been recorded by the judgment debtor or the spouse of the judgment debtor.

(c) A statement of the amount of any liens or encumbrances on the dwelling, the name of each person having a lien or encumbrance on the dwelling, and the address of such person used by the county recorder for the return of the instrument creating such person's lien or encumbrance after

recording.

Section 704.770. Setting and Notice of
Hearing on Application.

(a) Upon the filing of the application by the judgment creditor, the court shall set a time and place for hearing and order the judgment debtor to show cause why an order for sale should not be made in accordance with the application. The time set for hearing shall be not later than 45 days after the application is filed or such later time as the court orders upon a showing of good cause.

(b) Not later than 30 days before the time set for hearing, the judgment creditor shall do both of the following:

(1) Serve on the judgment debtor a copy of the order to show cause, a copy of the application of the judgment creditor, and a copy of the notice of the hearing in the form prescribed by the Judicial Council. Service shall be made personally or by mail.

(2) Personally serve a copy of each document listed in paragraph (1) on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy of each document in a conspicuous place at the dwelling."

Section 704.780. Hearing on Application.

(a) The burden of proof at the hearing is determined in the following manner:

(1) If the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the judgment creditor has the burden of proof that the dwelling is not a homestead. If the records of the county assessor indicate that there is not a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the burden of

proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead.

(2) If the application states the amount of the homestead exemption, the person claiming the homestead exemption has the burden of proof that the amount of the exemption is other than the amount stated in the application.

(b) The court shall determine whether the dwelling is exempt. If the court determines that the dwelling is exempt, the court shall determine the amount of the homestead exemption and the fair market value of the dwelling and shall make an order for sale of the dwelling subject to the homestead exemption. The order for sale of the dwelling subject to the homestead exemption shall specify the amount of the proceeds of the sale that is to be distributed to each person having a lien or encumbrance on the dwelling and shall

include the name and address of each such person. Subject to the provisions of this article, the sale is governed by Article 6 (commencing with Section 701.510) of Chapter 3. If the court determines that the dwelling is not exempt, the court shall make an order for sale of the property in the manner provided in Article 6 (commencing with Section 701.510) of Chapter 3.

(c) The court clerk shall transmit a certified copy of the court order (1) to the levying officer and (2) if the court making the order is not the court in which the judgment was entered, to the clerk of the court in which the judgment was entered.

(d) The court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling. If the court appoints an appraiser, the court shall fix the compensation of the appraiser in an amount determined by the

court to be reasonable, not to exceed similar fees for similar services in the community where the dwelling is located.

Section 704.790. Procedural Requirements on Specified Default at Hearing.

(a) This section applies in any case where the court makes an order for sale of the dwelling upon a hearing at which none of the following appeared:

- (1) The judgment debtor.
- (2) The judgment debtor's spouse.
- (3) The attorney for the judgment debtor.
- (4) The attorney for the judgment debtor's spouse.

(b) Not later than 10 days after the date of the order for sale, the judgment creditor shall serve a copy of the order and a notice of the order in the form prescribed by the Judicial Council:

- (1) Personally or by mail on the judgment debtor and the judgment debtor's spouse.

(2) Personally on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy of the order and notice in a conspicuous place at the dwelling.

(c) Proof of service and of any posting shall be filed with the court and with the levying officer. If the judgment creditor fails to comply with this subdivision and with subdivision (b) in any case where this section applies, the dwelling may not be sold under the order for sale.

(d) If, within 10 days after service of notice of the order, the judgment debtor or the judgment debtor's spouse files with the levying officer a declaration that the absence of the judgment debtor and the judgment debtor's spouse or the attorney for the judgment debtor or the judgment debtor's spouse from the hearing was due to mistake, inadvertence, surprise, or excusable neglect and that the judgment

debtor or spouse of the judgment debtor wishes to assert the homestead exemption, the levying officer shall transmit the declaration forthwith to the court. Upon receipt of the declaration, the court shall set a time and place for hearing to determine whether the determinations of the court should be modified. The time set for hearing shall be not later than 20 days after receipt of the declaration. The court clerk shall cause notice of the hearing promptly to be given to the parties.

Section 704.800. Insufficient Sale
Bids.

(a) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien, the homestead shall not be sold and

shall be released and is not thereafter subject to a court order for sale upon subsequent application by the same judgment creditor for a period of one year.

(b) If no bid is received at the sale of a homestead pursuant to a court order for sale that is 90 percent or more of the fair market value determined pursuant to Section 704.780, the homestead shall not be sold unless the court, upon motion of the judgment creditor, does one of the following:

(1) Grants permission to accept the highest bid that exceeds the amount of the minimum bid required by subdivision (a).

(2) Makes a new order for sale of the homestead.

Section 704.820. Joint tenancy,
tenancy in common

If the dwelling is owned by the judgment debtor as a joint tenant or tenant in common:

(a) At an execution sale of a dwelling, the interest of the judgment debtor in the dwelling and not the dwelling shall be sold. If there is more than one judgment debtor of the judgment creditor, the interests of the judgment debtors in the dwelling shall be sold together and each of the judgment debtors entitled to a homestead exemption is entitled to apply his or her exemption to his or her own interest.

(b) For the purposes of this section, all references in this article to the "dwelling" or "homestead" are deemed to be references to the interest of the judgment debtor in the dwelling or homestead.

Section 704.830. . . .; Appeal.

The provisions of [Section] 703.600 apply to proceedings under this article.

Section 704.840. Costs.

(a) Except as provided in subdivision (b), the judgment creditor is entitled to

recover reasonable costs incurred in a proceeding under this article.

(b) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, the judgment creditor is not entitled to recover costs incurred in a proceeding under this article or costs of sale.

Section 704.850. Distribution of
Proceeds of Sale.

(a) The levying officer shall distribute the proceeds of sale of a homestead in the following order:

(1) To the discharge of all liens and encumbrances, if any, on the property.

(2) To the judgment debtor in the amount of any applicable exemption of proceeds pursuant to Section 704.720.

(3) To the levying officer for the reimbursement of the levying officer's

costs for which an advance has not been made.

(4) To the judgment creditor to satisfy the following:

(A) First, costs and interest accruing after issuance of the writ pursuant to which the sale is conducted.

(B) Second, the amount due on the judgment with costs and interest, as entered on the writ.

(5) To the judgment debtor in the amount remaining.

(b) Sections 701.820 and 701.830 apply to distribution of proceeds under this section.

Article 5. Declared
Homesteads.

Section 704.920. Creation of Declared
Homestead.

A dwelling in which an owner or spouse of an owner resides may be selected as a declared homestead pursuant to this article by recording a homestead declaration

in the office of the county recorder of the county where the dwelling is located. From and after the time of recording, the dwelling is a declared homestead for the purposes of this article.

Section 704.950. When Judgment
Lien Does Not Attach to Declared
Homestead.

(a) . . . [A] judgment lien on real property created pursuant to Article 2 (commencing with Section 697.310) of Chapter 2 does not attach to a declared homestead if both of the following requirements are satisfied:

(1) A homestead declaration describing the declared homestead was recorded prior to the time the abstract or certified copy of the judgment was recorded to create the judgment lien.

(2) The homestead declaration names the judgment debtor or the spouse of the judgment debtor as a declared homestead owner.

. . . .

Section 704.970. Levy Pursuant to Writ
of Execution.

Whether or not a homestead exemption
has been recorded:

(a) Nothing in this article affects the
right of levy pursuant to a writ of execu-
tion.

(b) Any levy pursuant to a writ of
execution on a dwelling (as defined in
Section 704.710) and the sale pursuant
thereto shall be made in compliance with
Article 4 (commencing with Section 704.710)
and the judgment debtor and the judgment
creditor shall have all the rights and
benefits provided by that article.

Title 10.5. PARTITION OF REAL AND
PERSONAL PROPERTY.

Chapter 2. COMMENCEMENT OF ACTION.

Article 1. Complaint and Lis
Pendens.

Section 872.210. Who May Commence
Action.

(a) A partition action may be commenced

and maintained by any of the following persons:

. . . .

(2) An owner of an estate of inheritance . . . in real property where such property or estate therein is owned by several persons concurrently

Chapter 3. TRIAL.

Article 2. Determination of
Right to Partition.

Section 872.710. Right of Plaintiff
to Partition; Concurrent Interests
.
.
.

(a) At the trial, the court shall determine whether the plaintiff has the right to partition.

(b) . . . [P]artition as to concurrent interests in the property shall be as of right unless barred by a valid waiver.

. . . .

Section 872.720. Interlocutory
Judgment.

(a) If the court finds that the plaintiff is entitled to partition, it shall

make an interlocutory judgment that determines the interests of the parties in the property and, unless it is to be later determined, the manner of partition.

. . . .

Article 3. Determination of
Manner of Partition.

Section 872.810. Division According
to Interests.

The court shall order that the property be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment.

Section 872.820. Sale of Property;
Division of Proceeds.

Notwithstanding Section 872.810, the court shall order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment in the following situations:

(a) The parties agree to such relief, by their pleadings or otherwise.

(b) The court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property. . . .

Title 12. APPEALS IN CIVIL ACTIONS.

Chapter 2. STAY OF ENFORCEMENT
AND OTHER PROCEEDINGS.

Section 916. Stay on Perfection of
Appeal; Proceeding Upon Matters
Not Affected by Appeal."

(a) Except as provided in Sections 917.1 through 917.9 . . . , the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

(b) When there is a stay of proceedings other than the enforcement of the

judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from.

Section 917.1. Appeal from Money
Judgment; Undertaking to Stay
Enforcement; . . .

(a) The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action, unless an undertaking is given.

(b) The undertaking shall be on condition that if the judgment or order or any part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to

which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal. . . . The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order. The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court.

. . . .

Section 917.4. Judgment Directing
Sale, Conveyance or Delivery of
Real Property.

The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment

or order appealed from directs the sale, conveyance or delivery of possession of real property which is in the possession or control of the appellant or the party ordered to sell, convey or deliver possession of the property, unless an undertaking in a sum fixed by the trial court is given that the appellant or party ordered to sell, convey or deliver possession of the property will not commit or suffer to be committed any waste thereon and that if the judgment or order appealed from is affirmed, or the appeal is withdrawn or dismissed, the appellant shall pay the damage suffered by the waste and the value of the use and occupancy of the property, or the part of it as to which the judgment or order is affirmed, from the time of the taking of the appeal until the delivery of the possession of the property. . . .

E. CALIFORNIA CIVIL CODE.

Part 5 [of Division IV]. THE FAMILY
LAW ACT.

Title 8. HUSBAND AND WIFE.

Chapter 3. LIABILITY OF MARITAL
PROPERTY.

Article 2. General Rules of
Liability.

Section 5120.110. Community Property;
Earnings of Married Person.

(a) Except as otherwise expressly provided by statute, the community property is liable for a debt incurred by either spouse before or during marriage, . . . regardless whether one or both spouses are parties to the debt or to a judgment for the debt.

. . . .

APPENDIX B:
ORDERS, FINDINGS, AND JUDGMENT
OF CALIFORNIA AND COLORADO
DISTRICT COURTS

- A. The Order Appealed from to the Ninth Circuit: "Order Vacating Stay of Execution, Directing Sale of Real Property to Judgment Creditor, and Directing Distribution of Funds Upon Closing," filed March 7, 1986, in the California District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. MISC 15142
85-1854-TJH (Bx)

SUSAN THERESE FULTZ a/k/a
SUSAN FULTZ-SMALL,
Plaintiff,
vs.
MASON H. ROSE, V.,
Defendant.

ORDER VACATING STAY OF EXECUTION,
DIRECTING SALE OF REAL PROPERTY TO
JUDGMENT CREDITOR, AND DIRECTING
DISTRIBUTION OF FUNDS UPON CLOSING

DATE: March 3, 1986

[Filed March 7, 1986]

THIS MATTER having come regularly before
the Court on March 3, 1986, upon the Defen-
dant's Motion for Continuance of Order
Granting 90 Day Stay of Execution. At the

hearing conducted herein, Plaintiff was represented by Messrs. James A. Beckwith and Joseph M. Ferrante, and Defendant Ma-son H. Rose V was represented by Mr. James M. Weinberg. After consideration of the arguments of counsel, together with the pleadings and memoranda of law, the Court:

MAKES THE FOLLOWING FINDINGS OF FACT:

1. That on November 25, 1985, this Court granted Defendant a 90 day stay of execution of enforcement of money judgment for the purpose of allowing Defendant Ma-son H. Rose V (Rose), at his express re-quest, to obtain a bona fide buyer for the property located at 37 Crest Road West, Rolling Hills, California, for the sum of \$800,000.00.

2. That on March 3, 1986, the indebted-ness on said property to American Savings & Loan Association, Mr. Ellis Ring and one Mr. Joseph Smith is \$428,777.12.

3. That Plaintiff, in accordance with

her right under Section 701.590 C.C.C.P. has tendered her bid on said real property in the sum of \$321,222.68.

4. That the total of Plaintiff's bid and the prior lienholders equals \$750,000.00: the same being the appraised market value of the property.

5. That plaintiff has obtained a contract buyer for the property with whom she may readily consummate and close a resale of the property at \$750,000.00. This contract buyer has waited patiently to purchase the property since August, 1985. However, due to relaxation in interest rates, he will withdraw his offer if the property is not sold at this time.

6. That from the resale of the property to Plaintiff's contract buyer, Plaintiff proposes a distribution which will satisfy the prior lienholders, selling costs and voluntarily allow a \$45,000.00 homestead exemption for Wynonah D. Rose.

7. That Plaintiff's buyer did, on December 24, 1985, perform a physical inspection of the premises at 37 Crest Road West. Although noting the immediate need for repairs in the estimated sum of \$200,000.00, the buyer has nevertheless affirmed his offer to purchase the property from plaintiff.

8. That Plaintiff's bid and plan of distribution is bona fide, fair, reasonable, and completely in accord with Defendant's desire for a sale of the property at \$321,222.68, as expressed to this court on November 25, 1985.

9. That defendant has, since November 25, 1985, not committed any act in furtherance of his desire to obtain a private buyer. The defendant has not listed the property for sale, nor has he made any repairs to the property, nor has he contracted for any repairs to the property.

10. The court notes that there are

numerous lien claims made on the subject property, including the assertion of homestead exemptions by Wynonah D. Rose. It is obvious, and the parties here do not dispute, that the subject property will ultimately be sold, whether by plaintiff, by other lien claimants, or by defendant and his ex-wife Wynonah in their pending divorce proceedings. It is therefore in the interests of all parties and claimants to sell the property at the highest price obtainable with the least amount of expense in doing so. The court finds that plaintiff's contract buyer in affirming the purchase price of \$750,000.00 has tendered such an offer.

11. The court further notes that Wynonah D. Rose, defendant's ex-wife and a person directly affected by the sale of the property, has offered, and Plaintiff has accepted, to convey her one-half interest in the property to plaintiff by

quit-claim deed, upon plaintiff acquiring the property at execution sale. Wynonah D. Rose, together with the minor children of Defendant, reside at the property. The fact of this offer and agreement is compelling to this court and cannot be ignored.

AND THEREFORE ENTERS THE FOLLOWING ORDERS:

1. This Court's Order of November 25, 1985, granting a 90 day stay of execution, is hereby vacated and withdrawn.

2. The bid of Plaintiff Susan T. Fultz, pursuant to Section 701.590 C.C.C.P., in the amount of \$321,222.68 is hereby accepted by the Court.

3. The United States Marshall [sic], Central District of California, is hereby ordered to forthwith execute and deliver to Plaintiff Susan T. Fultz, or her attorney of record, a Marshall's [sic] Deed conveying to her all right, title and interest of Mason H. Rose and Wynonah D.

Rose in and to the following described real property:

Lot 3 of Tract 29408 as recorded in Book 308, Pgs. 27, 28, and 29 Maps of the Recorder's Office of Los Angeles County, California, and more commonly known as 37 Crest Road West, Rollings [sic] Hills, California.

4. That Plaintiff shall, within 90 days of this Order, or in such additional time as may be granted by this Court, conduct a closing on the resale of the subject property to her contract buyer. From such sale, Plaintiff shall satisfy the three prior lienholders identified herein.

5. That, in addition, Plaintiff shall, from said closing, satisfy all customary closing costs, realtor's commissions and deliver the sum of \$45,000.00 to Wynonah D. Rose, or her authorized attorney, which sum shall, upon delivery, satisfy the homestead claim(s) of Wynonah D. Rose and/or Mason H. Rose V. in and to the subject property. Upon such delivery,

- 51a -

Plaintiff shall be relieved of any and all further obligation for homestead rights, claims or exemptions on said property.

6. That all remaining sum [sic] after satisfaction of Paragraphs 4 and 5 above, shall be plaintiff's property to apply against her judgment.

7. Nothing in this Order shall be construed as abating, altering or effecting [sic] in any manner the claims of Plaintiff on other real property to satisfy the entirety of her judgment.

ORDERED AND SIGNED this 7th day of March, 1986.

BY THE COURT:

/s/
Honorable Terry J. Hatter, Jr.
Judge Presiding

B. Minute Order of the California District Court, filed March 3, 1986.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 85-1854-TJH Date 3/3/86
Title Susan Therese Fultz vs Mason Rose V

PRESENT:

HON. TERRY J. HATTER, JR., JUDGE
Florence Kato Deputy Clerk
Lynne Attardi Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

James Beckwith
Joseph Ferrante

ATTORNEYS PRESENT FOR DEFENDANTS:

James Weinberg

PROCEEDINGS: HRG re Deft's Motion for
Release of Dwelling and For Condi-
tional Stay Pending Appeal

Oral arguments heard. Motion denied.
Stay vacated.

- C. The Previous Temporary (90-Day) Stay
Order: "Order on Defendant's Motion
for Partial and Conditional Stay
Pending Appeal, to Prevent Distress
Sale of Family Home," filed November
25, 1985, in the California District
Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORDER ON DEFENDANT'S MOTION FOR
PARTIAL AND CONDITIONAL STAY PENDING
APPEAL, TO PREVENT DISTRESS SALE
OF FAMILY HOME

[Filed November 25, 1985]
[Caption Omitted]

Defendant's Motion for Partial and Conditional Stay Pending Appeal, to Prevent Distress Sale of Family Home and Permit the Orderly Sale Thereof came on regularly for hearing before this Court on November 25, 1985. Plaintiff was represented by James A. Beckwith, and Defendant by James M. Weinberg.

After consideration of the documents and evidence filed by the parties, and the arguments of their respective counsel, the Court grants the motion upon each of the terms and conditions specified herein, and ORDERS THAT:

The Marshall's [sic] sale of the Rose family home (located at 37 Crest Road West, Rolling Hills, California), which was previously stayed through and including November 25, 1985 (by this Court's Order of September 26, 1985), is hereby further stayed during the pendency of the appeal from this Court's "Order After

Contempt Hearing July 15, 1985" (which appeal is now pending in the Ninth Circuit Court of Appeals, Docket No. 85-6202) but only on condition:

(1) That Defendant Rose, on or before Monday, December 1, 1985, prepay, bond, or deposit in court all interest on the prior first and second trust deed loans on said property, for the period from but not including November 25, 1985, through and including December 31, 1985.

(2) That Defendant Rose, on or before January 2, 1986, and on or before the first day of each calendar month thereafter throughout the period of the stay hereunder, prepay, bond or deposit in court all interest on the prior first and second trust deed loans on said property, for the period from but not including the last day of the preceding calendar month, through and including the last day of the current calendar month; if the first day

of any such calendar month is not a business day, the due date hereunder shall be extended to the next business day.

(3) That Mr. Rose continue, in full force and effect, all hazard insurance on said property, throughout the period of the stay hereunder, by paying any and all premiums on or before their respective due dates.

(4) That Mr. Rose pay, on or before December 10, 1985, and on or before each subsequent tax delinquency date during the period of the stay hereunder, all property taxes payable on the property.

(5) That Mr. Rose, and Mrs. Wynonah D. Rose, agree to endeavor to maintain the property in at least its present condition, and not to commit any act that would decrease the value of property, excepting only reasonable wear and tear and action of the elements.

(6) That any sale of the property be

for all cash, except only that, if and to the extent that the net proceeds of the sale exceed the amount that would have been derived from an all cash sale of \$675,000 on August 22, 1985 (the amount of the Minimum Bid advertised by Plaintiff for her contemplated sale that was advertised for that date) it may be for other than cash (such as by an indebtedness secured by a junior lien on the property).

(7) That the net proceeds of the sale (whether consisting of cash, evidence of indebtedness, payments on indebtedness, or otherwise) be deposited in this Court, for distribution only pursuant to further order of this Court or the United States Bankruptcy Court for this district. As used in this paragraph 7 and in the proceeding [sic] paragraph 6, "net proceeds of the sale" refers to the gross amounts received from the sale, less only (1) the payments required to fully pay off and

obtain a reconveyance of the first and second trust deeds on the property; (2) selling costs and commissions on the sale of the property, which shall not exceed those customary for similar sales of similar properties in the same general area; and (3) reimbursement to Mr. Rose (or direct payment to third parties who have not yet been paid) of any costs of maintenance or repairs, or fix-up-costs, actually incurred, reasonably and in good faith, in connection with the sale of the property.

The stay is for a period of 90 days.

DATED: November 25, 1985.

/s/

Honorable Terry J. Hatter, Jr.
Judge of the United States
District Court

D. Judgment, entered December 11, 1984, in the Colorado District Court (and registered by filing January 17, 1985, in the California District Court). */

*/ The Colorado default judgment was accompanied by findings and an order, set forth in Rose's previous petition for certiorari (in No. 87-1559) at 25a-42a.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-M-2163

SUSAN THERESE FULTZ
a/k/a SUSAN FULTZ-SMALL,
Plaintiff,

v.

MASON H. ROSE, V., H.L. QUIST, and
H.L. QUIST MANAGEMENT AND DEVELOPMENT
CORPORATION,
Defendants.

JUDGMENT

[Entered December 11, 1984]

Pursuant to and in accordance with the Findings of Fact and Order for Default Judgment, entered by the Honorable Richard P. Matsch, Judge, signed and filed on December 11, 1984, and it is

ORDERED, that judgment is entered in favor of the plaintiff and against the defendant Mason H. Rose, V., and it is

FURTHER ORDERED, that the plaintiff shall have and recover from the defendant Mason H. Rose, V., compensatory damages in the amount of \$106,128.34 which includes 15% interest per annum on the

unpaid lease value to the date of this judgment; attorney's fees in the amount of \$9,917.19 pursuant to the Equipment Lease Agreement for a total compensatory damages of \$116,045.53, and it is

FURTHER ORDERED, that the plaintiff shall have and recover from the defendant Mason H. Rose, V., punitive damages in the amount of \$348,136.59 plus court costs, as determined by the Local Rule 105, in the amount of \$570.50 for a total judgment of \$464,752.62 which sum shall bear interest at the rate of 9.5% from the date of the entry of this judgment, and it is

FURTHER ORDERED, that this judgment is a final judgment under F.R.Civ.P. 54(b) because there is no just reason for delay.

DATED at Denver, Colorado, this 11th day of December, 1984.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

/s/

Stephen P. Ehrlich,
Chief Deputy Clerk

APPENDIX C:
NINTH CIRCUIT JUDGMENT
SOUGHT TO BE REVIEWED, AND
ORDER ON REHEARING

- A. The Judgment Sought to Be Reviewed:
"Order Dismissing the Appeal as Moot,"
Filed December 11, 1987 in the Ninth
Circuit Court of Appeals, and Published
as Fultz v. Rose, 833 F.2d 1380 (9th
Cir. 1987).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5829
D.C. No. CV 85-1854

SUSAN THERESE FULTZ, a/k/a Susan Fultz-
Small, Plaintiff-Appellee,
v.
MASON H. ROSE, V, Defendant-Appellant.

ORDER DISMISSING THE
APPEAL AS MOOT

Appeal from the United States District
Court for the Central District
of California
Terry J. Hatter, Jr.,
District Judge, Presiding

Argued and Submitted
November 6, 1987--Pasadena, California

Filed December 11, 1987

Before: Arthur L. Alarcon, Dorothy W.
Nelson and Stephen Reinhardt,
Circuit Judges.

COUNSEL

James A. Beckwith, Wheat Ridge, Colorado,
for the plaintiff-appellee.

James M. Weinberg, Los Angeles, California,
for the defendant-appellant.

ORDER

The appeal in the above captioned action is hereby DISMISSED as moot. An appeal must be dismissed as moot when intervening events that do not involve wrongful conduct by the appellee leave the appellate court unable to grant effective relief. In re Combined Metals Reduction Co., 557 F.2d 179, 187 (9th Cir. 1977). Fultz sold the Rose property to Mr. and Mrs. Hawkins in compliance with the district court's March 7, 1986 order. Because Mr. and Mrs. Hawkins are not parties to this action, we are no longer able to grant any effective relief from that order or to reach the merits of this appeal.

In accordance with the Supreme Court's guidance in United States v. Munsingwear, 340 U.S. 36, 39 (1950), we dismiss this appeal and vacate the district court's order entered March 7, 1986. Vacation of the March 7 order shall not operate retroactively and shall have no legal effect on actions or conduct already undertaken in reliance on or under the authority of that order.

B. Order on Rehearing: Unpublished Order of the Ninth Circuit Court of Appeals, Filed January 27, 1988, Denying Rose's Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5829

ORDER

[Filed January 27, 1988]
[Caption Omitted]

Before: ALARCON, NELSON and REINHARDT,
Circuit Judges.

Upon due consideration, the Petition for Rehearing is DENIED.

